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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. 39.

PETITION FOR REHEARING.

MILTON H. TUCKER,
ROBERT T. BURCH,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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PETITION FOR REHEARING.

To the Honorable the Justices of the Supreme Court of the United States:

Comes now The May Department Stores Company, doing business as Famous-Barr Company, Petitioner in the above entitled cause, and presents this its petition for a rehearing of said cause, pursuant to Rule 33 of this Court, and in support thereof Petitioner respectfully states:

1. "Appropriate Unit." The Court has overlooked the fact that all the evidence in the case shows that the unit was not claimed for the benefit of the employees in the unit, but for the advantage of one of the two unions carrying on rival organizing campaigns in a storewide unit in which both unions claimed substantial membership.

The Court has also overlooked the fact that the trade involved in this case is the alteration of clothing in a department store and that the evidence in the case and the Board's finding show that the skill required for the alteration of women's clothing is the same skill as that required for the alteration of men's clothing.

2. "Form of Ballot." This Court was in error in assuming that any of the employees, when signing a designation of Local 372 as representative, was aware of the affiliation of Local 372 with the St. Louis Joint Council. The Joint Council had not been designated by any of the employees, but its name was placed on the ballot by the Board as the only labor organization on the ballot.

In view of the Board's well-known policy of refusing to order an election unless the petitioning union has been designated by a minimum of approximately thirty per cent of the employees in the proposed unit, the Board's action amounted to material misrepresentation affecting the result of the election.

The Act gives the employer the right to object to arbitrary and capricious action of the Board not only as to the composition of the unit but also as to any action affecting the result of the election.

3. "Action on Wages." The opinion of the Court effectively destroys the right given by the Act to judicial review of a certification. The opinion also gives to a union, which has been certified as the representative of only a small number of employees, veto power over the acts of the employer with respect to all its employees.

4. "Breadth of Order." The language which the Court added to paragraph 1 (a) of the Board's order lacks specificity and the order remains too broad in any event.

Petitioner submits herewith suggestions in support of this petition; setting forth citations to the record and to

the authorities and discussing briefly the foregoing grounds of the petition.

Wherefore, it is respectfully urged that this Petition for Rehearing be granted and that, upon further consideration, the Decree of the United States Circuit Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

MILTON H. TUCKER,
ROBERT T. BURCH,
Attorneys for Petitioner.

Certificate of Counsel.

Milton H. Tucker and Robert T. Burch, Attorneys for the above named petitioner, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Milton H. Tucker,
Robert T. Burch.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

In support of the foregoing Petition for Rehearing, Petitioner respectfully submits the following suggestions:

I.

"APPROPRIATE UNIT."

The Court has overlooked the fact that all the evidence in the case shows that the unit was not claimed for the benefit of the employees in the unit, but for the advantage of one of the two unions carrying on rival organizing campaigns in a store-wide unit in which both unions claimed substantial membership.

The record in this case makes it clear that the attainment of collective bargaining rights for the employees of the two small departments involved in this case was purely incidental to the store-wide organizing strategy of the Master Committee for the whole store. There is nothing to indicate that the employees in these two departments were consulted as to whether they wished to be represented by the Joint Council; or were consulted when the store-wide Master Committee made the decision by which these departments were first to be represented by Local 372 as part of a store-wide unit (Intervener's Ex. 17, R. 169); or were consulted when the Master Committee decided to petition for a unit of only the bushelmen in the name of the Joint Council (R. 96, 97). The witness, Verderber, testified that all the employees in departments 280 and 281 signed up about the same time and that he signed up in September, 1942 (R. 96). Board's Exhibit 3 (R. 156) shows that the cards on which the showing of representation was based were all signed late in September and early in October, 1942. So that the same cards

were used when Local 372 petitioned for a store-wide election in November 1942 and then when that petition was unsuccessful the Joint Council submitted the same cards in support of its petition for representation of departments 280 and 281. There is no evidence that the employees in the busheling departments ever authorized this action, or knew that it was going to take place, for according to Verderber's own testimony he did not know how the petition happened to be filed by the Joint Council even though he was the steward of the busheling departments and a member of the Master Committee (R. 94, 95).

It is obvious that the formation of this unit and the use of the Joint Council as a fictional representative without the knowledge of the employees are tied together and demonstrate the lack of good faith in the designation of the unit. The unit was designated in the petition for certification by the Joint Council filed in the interest of the store-wide organization campaign and not in the interest of or with the consent and knowledge of the busheling department employees.

While the Board has large discretion in the selection of units in order to afford collective bargaining to the employees who have indicated a desire for it and in the group in which they desire to be represented, this process should not be perverted to further the organizing campaign of one union in disregard of the desires of the members in the departments involved.

The Union stated plainly that this was the first of a series of election petitions and that others would follow shortly and that its plan to divide the store into small units did not conflict with its store-wide organizing campaign, but "We believe this new approach may do the job faster" (Intervener's Ex. 11, R. 163). It also stated:

"Where we will petition next depends upon only

one thing. That is which group is ready next" (Intervener's Ex. 12, R. 166).

Nothing in the Court's reasoning nor in the authorities mentioned furnishes any justification for the Board's arbitrary action in this case. Certainly, the case of **N. L. R. B. v. Hearst Publications**, 322 U. S. 111, 134, mentioned by the Court, does not support the Board's action in dividing a department store into small units at the request of one of two rival unions, each conducting store-wide organizing campaigns, where the union on whose petition the small unit is established has stated publicly its reason for desiring the small unit is merely to outdistance the other union in the store-wide unit.

The opinion of the Court states:

> "We think that there was ample testimony to support the Board's conclusion that the employees of the two busheling rooms were an appropriate unit, since these employees had a degree of self-organization and **a special trade which sufficiently differentiated them from other employees.**" (Emphasis supplied.)

The Court has overlooked the fact that the trade involved here is the alteration of clothes in a department store, and that the evidence in the case and the Board's finding show that the skill required for the alteration of women's clothing is the same skill as that required for the alteration of men's clothing.

Whatever may be said to the effect that those who work on men's clothing, "speaking generally," belong in large numbers to the Amalgamated Clothing Workers and those who work on women's clothing belong in large numbers to the International Ladies Garment Workers Union, that division in the field of organization applies to the manufacturing industry (R. 225, 226, 231) and not to alteration departments in retail stores (R. 104, 160, 168; 47 N. L. R. B.

614). The Union involved in this case is neither the Amalgamated nor the International Ladies Garment Workers, and the industry involved in this case is not the industry in which those unions function. The record in this case shows that the employees in Departments 280 and 281 did not have a special trade which differentiated them from the employees in other departments engaged in the alteration of women's clothing (R. 132; 133).

We submit that the determination of the unit in this case was arbitrary, unreasonable and capricious.

II.

"FORM OF BALLOT."

This Court was in error in assuming that any of the employees, when signing a designation of Local 372 as representative, was aware of the affiliation of Local 372 with the St. Louis Joint Council. The Joint Council had not been designated by any of the employees, but its name was placed on the ballot by the Board as the only labor organization on the ballot.

In view of the Board's well-known policy of refusing to order an election unless the petitioning union has been designated by a minimum of approximately thirty per cent of the employees in the proposed unit, the Board's action amounted to material misrepresentation affecting the result of the election.

The opinion of the Court on this point leaves it uncertain whether the Court denied Petitioner's contention (a) because it did not believe that the placing of the Joint Council on the ballot was improper and might have been confusing, or (b) because Petitioner failed to prove the extent of confusion of the voters resulting from the action of the Board, or (c) because the Court felt that regardless of the extent to which the confusion may have existed in

the minds of the voters, or the resultant effect on the outcome of the election, the question may not be raised by the employer.

In any case we believe that the decision of the Court on this point is due both to a misunderstanding of the facts and to our failure to point out the important distinction between the situation in **N. L. R. B. v. Franks Bros. Co.**, 137 F. (2d) 989, 992, and the present case.

(a) The Court's misapprehension as to the facts.

We believe that it is important to point out that there is nothing whatever in the record in the present case to justify the inference that a single one of the employees either knew, or had any reasonable grounds to believe, when he signed a card in September 1942 designating Local 372 as his representative, that he was thereby authorizing a **more inclusive** organization to represent him. There was **no** finding by the Board (nor was there any basis for finding) that **any** of the employees knew that they were becoming affiliated with the Joint Council.

The only findings in the Intermediate Report as to the St. Louis Joint Council are as follows:

> "St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America is a labor organization affiliated with the Congress of Industrial Organizations. The Joint Council represents in St. Louis various locals of United Retail, Wholesale & Department Store Employees of America which admit to membership employees of the respondent" (R. 49).

Aside from affirming the rulings of the Trial Examiner and adopting his findings, conclusions and recommendations (R. 45), the Board made no specific finding as to the Joint Council in its Decision and Order.

The following is the only relevant statement by the Circuit Court of Appeals on the subject:

> "At **that** time the evidence **tends** to show that the employees **understood** that the joint Council represented them. But the respondent argues that they signed cards designating Local 372 as their representative. Frank Verderber, a member of the master committee of Local 372, **testified that at the time he signed the card he knew that Local 372 was a part of the Joint Council.** When asked on cross-examination the question, 'Have you ever authorized the St. Louis Local Joint Council to represent you?' he answered, 'I think that takes care of it automatically, when I signed that first card.' His testimony on this point is **corroborated by other testimony**; and there is no contradictory testimony in the record" (R. 267). (Emphasis supplied.)

It will be noted that the Circuit Court found that "at **that** time the evidence **tends** to show that the employees **understood** that the Joint Council represented them." The "time" referred to was the time of the filing of the petition. The only employee who was chosen to testify on the subject was Verderber, who was a member of the Master Committee which was organizing the whole store (R. 88, 89, 95), and who was therefore presumably the best informed of all the employees; and there is absolutely nothing to indicate that any of the other employees had any information on the subject whatsoever. The only evidence relied on by the Court as tending to show the employees' understanding was that of Verderber, as to whom the Court found

> "**that at the time he signed the card** he knew that Local 372 was a part of the Joint Council."

Not only was there no testimony to that effect, but the only testimony was directly to the contrary. The specific

testimony of Verderber on which the Circuit Court of Appeals relied for its statement that Verderber testified that at the time he signed the card designating Local 372 (which was in September 1942, R. 77), he knew that Local 372 was a part of the Joint Council, is his testimony that

> "I think that takes care of it automatically, when I signed that first card" (R. 267).

But Verderber could not possibly have thought in September 1942, when he signed the card authorizing Local 372 to represent him, that he was thereby authorizing the St. Louis Joint Council to represent him, because he did not learn that there was any affiliation until six months later. As he testified, he found out that Local 372 was affiliated with the St. Louis Joint Council only about a month before the hearing (R. 101), which began on May 7, 1943 (R. 7).

Certainly if Verderber, who was by all odds in a position to be the best informed employee in departments 280 and 281, and who was the only witness relied on by the Court, did not know when he signed a card designating Local 372 to represent him that he was thereby authorizing the Joint Council to represent him, it cannot be assumed that any of the others knew it at the time they signed their cards in September 1942; nor is there any evidence that they ever learned it later.

Perhaps the **Board** might have ignored the fact that no other employee but Verderber testified on this subject and have drawn an inference as to what the **other** employees understood; and perhaps (although this is very doubtful) the **Board** might have ignored Verderber's testimony that he never signed a card authorizing the St. Louis Joint Council to represent him (R. 89) and never designated the St. Louis Joint Council to represent him (R. 90), and that

he knew of no employees who had signed such cards (R. 90) and **that he didn't know how it happened that the Joint Council filed the petition for certification** (on which this case depends) for the bushelmen (R. 94, 95), and might have relied entirely upon the evasive and unresponsive statement in response to the question, "Have you ever authorized the St. Louis Local Joint Council to represent you?":

> **"A. I think that takes care of it automatically, when I signed that first card."**

But we do not believe that the Circuit Court of Appeals had the authority to draw any such inference or make any such findings based on such flimsy evidence, particularly when the witness had just testified in answer to a question by the Trial Examiner that **he had never designated the Joint Council to represent him** (R. 90). It would have been questionable enough whether the Court of Appeals could have sustained such a finding, had it been made by the Board. But in view of the Board's failure to go so far, we do not believe that the Court could do so.

And the finding by the Circuit Court of Appeals that this testimony was corroborated by other testimony (R. 267) is completely without foundation.

But, it would seem that this Court likewise assumed (contrary to the fact) that the employees in the busheling rooms knew, or had reason to believe, that in signing a card in September 1942 applying for membership in Local 372, they had automatically designated the St. Louis Joint Council to represent them. This Court indicates as much by stating:

> **"The Board pointed out in its finding of facts on the petition for an election that the Joint Council represented this Local and similar Locals in other stores."**

There is no doubt that the record shows something of an indefinite relationship between Local 372 and the Joint Council. But the real question is whether the employees knew of this affiliation.

This Court implies by its citation of the case of **N. L. R. B. v. Franks Brothers Co.**, 137 F. (2d) 989, 992, that it does not distinguish between the Franks case in which it was held that the designation of a parent includes the designation of a subsidiary, and the present case in which the result can be justified only upon the theory that the designation of a subsidiary automatically designates a parent union holding company of which the employees had no knowledge when making the designation.

Furthermore, in the Franks case, where the employees had signed two different forms of membership cards, the **Board** found specific knowledge at the time of signing the applications, as follows:

> "It is clear that employees signing either type of membership card **were aware** that they were applying for membership in the Union."
>
> (44 N. L. R. B. 898, 910.)

There was no such finding by the Board in the present case—and no basis for any such finding by the Circuit Court of Appeals.

It is understandable that an employee in signing a card designating an International, would expect, to be represented by a constituent Local; not only does the greater include the lesser, but that is the normal procedure in labor union organization. However, in the present case it does not follow that the designation of a **Local** authorizes a **Joint Council** to represent the employee, where the employee had no knowledge of the relationship between the Local and the Joint Council at the time of the desig-

nation, and certainly no reason to assume that any such blanket authorization was being given. The lesser certainly does not include the greater and there is no custom under which the designation of a local union includes any organization with which the Local may be, or become, affiliated. Certainly an employee who has designated a Local Union as his representative would expect to have some voice in his designated agent and he should not be held to have selected a larger agency, of which his own Union was only one of several constituent organizations, in the absence of either express or clearly implied intention. Therefore, the Franks case and others of that type which deal with a converse situation are not authority.

We believe that the foregoing should demonstrate that there was no basis in fact or law for the assumption made by the Circuit Court of Appeals that the employees in the busheling departments understood when they signed an authorization card for Local 372 that they were authorizing a holding company of Local Unions (the Joint Council) to represent them; especially, since as Verderber testified, he did not know how it came about that the Joint Council filed the petition for representation in this case (R. 94, 5). And yet such knowledge is indispensable to the validity of the result in this case, as shown by the Franks case and by the assumptions made by the Circuit Court of Appeals in this case. Even the Board's Brief (p. 70) argues that "the employees were cognizant of this fact."

(b) The possibility of confusion.

The next question is whether or not it is necessary for the Petitioner to show that there was actual confusion in the minds of the employees resulting from the error of the Board, and whether the probability of such confusion is sufficient to invalidate the certification.

Certainly the Board's action in placing the Joint Council on the ballot, in view of its well established practice, was equivalent to a representation that approximately 30% of the employees had already designated the Joint Council.

We feel that it is only reasonable to assume as a matter of common experience that an employee would be more likely to vote for the Joint Council if he thought that a substantial number of his fellow employees had signed cards designating it as their choice, than if he knew that **none** of them had done so. Admittedly, there is no means to measure the extent to which any individual employee would be so influenced, or the number of employees who were so influenced.

It is conceded that the Board may not be arbitrary or capricious in its action, even in a representation case; and we think it should be equally clear that the Board may not, innocently or otherwise, take any action which **might** influence the result of an election.

This is in line with the Board's own announced policy as set forth by the Board at page 51, Chapter V, of the **Eighth Annual Report of the National Labor Relations Board**, as follows:

> "The Board seeks to conduct elections under circumstances which will insure that the employees express their free and independent choice of representatives. The integrity of the Board's election machinery has been universally recognized."

This certainly implies that the Board's election machinery will not be used to influence in any possible way the result of the election.

The Board also says in the same annual report, at page 52:

> "The Board has also set aside an election where

one of the labor organizations involved distributed sample ballots bearing the name of the Regional Director, thereby giving rise to the erroneous impression that the Board was lending its support to one of the contestants."

As the Board said in the case of **Sears, Roebuck & Co., 47 N. L. R. B. 291**, l. c. 293:

> "In order to maintain the integrity of secret ballot elections conducted by the Board, it is necessary that employees be not misled by any action, innocent or otherwise, into believing that the Board favors one labor organization over another. It is clear and we find that employees **may** have received the erroneous impression, from the marked sample ballots distributed by the C. I. O. bearing the name of the Regional Director, that the Board was lending its support to one of the contestants in the election."

The Board set aside that election because of the mere possibility that one or more voters may have thought that the Board favored one Union over another.

In the case before the Court, it is much more likely that the employees were influenced by the action of the Board in placing on the ballot as the only candidate the name of an organization which not one employee had designated, in view of the Board's usual policy of not holding an election unless a substantial number of employees have been found to have previously designated the party on the ballot.

In the matter of **Certain-teed Products Corporation and Order of Railway Conductors**, 49 N. L. R. B. 360, the Board set aside an election because the official ballot designated the Union as "Brotherhood of Railway Trainmen" instead of "Brotherhood of Railroad Trainmen." The Board said that

"Since employees **may have been misled** by this variance we shall vacate and set aside the election."

Among the many other pronouncements of the Board that it should avoid the mere possibility that some of the employees may have been misled is the following:

"Similarly, the Board will not place upon the ballot the name of a Union which has no members or only a very few members, relatively, among the employees in an appropriate unit (Matter of Southern California Gas Company, 10 N. L. R. B. 1123)." Fourth Annual Report of the N. L. R. B., page 79.

In the matter of **Douglas Aircraft Company**, 51 N. L. R. B. 161, the Union withdrew from the A. F. of L. However, due to an error, the letters "A. F. L." were printed on the sample ballot although they were not on the official ballot. The Board ordered a new election to be held, stating that the voters may have been misled by such letters on the **sample** ballot.

Also see the case of **Dedeman Foundry & Machine Company**, 52 N. L. R. B. No. 104.

This is not a case where the Board merely waived its own rule that it will not ordinarily order an election unless the petitioning union shows that it represents a minimum of approximately 30% of the employees in the appropriate unit. This is in fact a case where the evidence shows that the Board placed on the ballot as the **only** candidate a Union which had not been designated as the representative of a **single** employee. Who can say that some of the employees were not influenced by the Board's representation to each employee that a substantial number of his fellow employees had already designated the St. Louis Joint Council as their representative? The burden is not on the Petitioner to show the result of such influence, but only that the influence was present.

(c) Company's right to object.

The only remaining question is whether or not the Company is in a position to question a certification which has resulted from the improper action of the Board in influencing the result of the election, under such circumstances that if the conduct of the Board had been attributable to the Union or the Company, it would have, under the Board's own procedure, been sufficient to cause the election to be set aside. This question was raised during the oral argument and it may be implied in the language of the opinion of the Court—"In the circumstances of this election, we see no basis for the Company's objection to the certified representative on the ground of possible confusion of the employees."

We cannot believe that Congress intended that the Board should be able to influence the result of an election and to defend such action on the ground that this is no concern of the employer. We cannot believe that the Board will not be held to the same standards in its conduct as it requires of the Unions participating in an election. Nor can we believe that under the Act, which gives the employer the right to object to a unit that has been selected by the Board according to arbitrary standards (even though a majority of the employees in the unit may have voted for representation by a particular Union), the employer, who by law is required to deal with the certified representative, may not object and obtain review where the certification has been the result of express or implied misrepresentation, intentional or unintentional, on the part of the Board.

III.

"ACTION ON WAGES."

The opinion of the Court effectively destroys the right given by the Act to judicial review of a certification. The opinion also gives to a union, which has been certified as the representative of only a small number of employees, veto power over the acts of the employer with respect to all its employees.

The Court in its Opinion, after stating that collective bargaining by an employer with any one except the duly recognized or accredited representative of the employees violates Section 8 (1) of the Act, states:

> "Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities."

We submit that by so holding the Court has effectively destroyed the right granted by Congress in Sections 9 (d) and 10 (e) and (f) of the National Labor Relations Act, whereby an employer may have judicial review of a certification issued by the Board under Section 9 (c) of the Act. Although the opinion of the Court mentioned only "changes in wage scales", there is no basis for any distinction between such changes and changes in hours or other conditions of employment, for Section 9 (a) of the Act provides that representatives chosen under the Act shall be the exclusive representative of all the employees in the unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

It follows, therefore, from the Court's language quoted above that in any case where the Board certifies a union

as the representative of any unit, no matter how small, in an employer's business, the employer may not exercise the right to have judicial review granted by Congress, if he finds it necessary or desirable, pending the ultimate decision of such review, to make any changes in wages, hours or other conditions of employment affecting all his employees. Under such circumstances, the establishment of a store-wide or even a system-wide pension plan, the granting of sick leave, closing the business on such an occasion as V-J Day without loss of pay to the employees, the payment of a Christmas bonus, or any other change in wages, hours or working conditions, would forfeit the employer's right to have judicial review of the certification, because any such action would compel the employer to bargain with the certified union as representative of some small number of the employees in the business and thus remove the only means by which the employer could under the Act secure such judicial review.

It is apparent from the Court's Opinion that no such destruction of a Congressionally granted right was intended by the Court, for the Opinion contains a suggested procedure by which it is said the employer could make changes in wages without violating the Act and with reservation of the Company's legal right to challenge the certification of the bargaining agent. In making such suggestion, however, the Court has overlooked the conflict inherent therein. The Court's suggestion is that the employer should bargain with the certified representative "with reservation of the company's legal right to challenge the certification of the bargaining agent when any complaint might be filed for refusal to bargain collectively." The conflict seems clear. Applied to this case the suggestion seems to be that the Petitioner could have bargained with the Joint Council while reserving its right to challenge the certification of the Joint Council, if the

Joint Council should charge that the Petitioner refused to bargain. Assuming that such a reservation were possible and that the Petitioner by recognizing and bargaining with the Joint Council would not forfeit its right to challenge the certification of the Joint Council, does it not follow that the suggested procedure set forth in the opinion of the Court would merely postpone the day when the Petitioner would be required to choose between the normal operation of its business and the surrender of the right to judicial review granted by Congress? The Court's suggested procedure means clearly that the employer may not avail itself of the right to judicial review while operating its business and making the necessary operating changes under the constantly fluctuating conditions of business.

In the case of **American Federation of Labor v. National Labor Relations Board**, 308 U. S. 401, 409, this Court said of the National Labor Relations Act,

> "The statute on its face thus indicates a purpose to limit the review afforded by Section 10 to orders of the board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms."

In that case this Court said also:

> "And in considering the provisions of Section 9 (d) the committee reports were emphatic in their declaration that the provisions of the bill for court review did not extend to proceedings under Section 9 except as incidental to review of an order restraining an unfair labor practice under Section 10. The bill was similarly explained on the Senate floor by the committee chairman who declared: 'It provides for review in the courts only after the election has been held and the board has ordered the employer to do something predicated upon the results of an election.' 79 Cong. Rec. 7658."

The employer's right to judicial review accrues only when he refuses to bargain with the certified union. It seems clear, therefore, that the employer cannot preserve that right and at the same time bargain with the certified union on every change in wages, hours and working conditions which may be necessary for the operation of the business. The conflict is magnified in a case such as this where the union has been certified as the representative of only 30 to 40 employees out of approximately 5,000 employees in the employer's establishment. As stated in the minority opinion in this case:

> "Had it recognized the union, by seeking its permission to include the affected employees, there would have been no factual or legal basis for the only proceedings by which review was assured; and, in order to secure it, the company then would have been forced to commit some other act of unfair practice or to take its chance upon some other doubtful remedy. In either event, it would have been confronted with its prior action of dealing with the union and the possibilities this would present either for applying the broad doctrine of estoppel or for occupying the inconsistent, not to say indefensible, position of having recognized the union and then having deliberately repudiated the recognition."

It seems clear, therefore, that the employer cannot bargain with a certified union and at the same time obtain judicial review of the certification. The right to judicial review is given by the Act, but the right can be exercised only by refusing to bargain. It follows therefore that the opinion of the Court effectively destroys the right of review given by the Act.

The only reason mentioned in the opinion of the Court for denying the right of review granted by Congress is the following:

> "By going ahead with wage adjustments without negotiation with the bargaining agent, it took a step which justified the conclusion of the Board as to the violation of Section 8 (1). Such unilaterial action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent. If successful in securing approval for the proposed increase of wages, it might well, as the Board points out, block the bargaining representative in securing further wage adjustments."

We submit that this reasoning does not justify the Court's denial of a right given by the Act. The wage increase proposed in this case was not such an increase as would or might "minimize the influence of organized bargaining." It was not such as would or might emphasize to the employees "that there is no necessity for a collective bargaining agent." It was an increase proposed under the regulations of the National War Labor Board to correct substandards of living (Board's Ex. 9, R. 196A, 196B). There was no question of bargaining involved and the proposed action could not possibly minimize the influence of organized bargaining. The action was not limited to the 30 or 40 employees which the Joint Council claimed to represent, but it was store-wide. The Union could not have been deprived of any credit to which it was entitled, for it did not claim to represent the 4500 other employees involved, and it certainly could not claim credit for the determination by the National War Labor Board of **rates necessary to eliminate substandards of living.** The Union had no more right to claim credit for the proposed action than for the operation of the store. Before it can be said that the Union was deprived of any credit it must first be found that it was entitled to credit, and such a finding was impossible in this case.

The speculation that the proposed increase might block the Union from securing further increases is not based on any evidence in the case and is wholly without foundation. Board's counsel in oral argument departed from the record to state that the National War Labor Board would not entertain an application for approval of a second increase for the same employees. If we were permitted to go outside the record it would be a very simple matter to show how misinformed Board's counsel is. We believe surely the Court did not base its decision upon counsel's erroneous statement. Certainly it would not be reasonable to believe that the National War Labor Board would refuse approval of an otherwise approvable increase because it had previously approved the elimination of substandards of living.

We submit that the Court's Opinion as to the proposed wage increase effectively destroys the right to a judicial review of a certification and that there is nothing in this case which justifies the Court's denial of the right given by the Act.

IV.

"BREADTH OF ORDER."

The language which the Court added to paragraph 1 (a) of the Board's order lacks specificity and the order remains too broad in any event.

The opinion of the Court quotes with approval from the case of **National Labor Relations Board v. Express Publishing Company**, 312 U. S. 426, 437, the following:

> "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."

The Court then held that the decree should not enjoin Petitioner generally, since its actions have not been determined by the Board to have been motivated by an attitude of opposition to the purposes of the Act. Under such circumstances we submit that the decree should not, in any event, be broader than that ordered by the Court in the **Express Publishing Company** case, where the company was enjoined from "any other acts in any manner interfering with the representative's efforts to negotiate." The Court here has added the words "or represent the above named employees as bargaining agent." The added words are so broad that the employer must be in constant doubt as to what is required of it. Any action taken by the employer which affects all its employees may be claimed by the Union and by the Board to be interference with the Joint Council's representation of the 30 employees. We submit that under the Court's opinion and under the facts of this case the decree should not in any event be broader than that ordered by the Court in the **Express Publishing Company** case.

CONCLUSION.

We know, of course, that careful consideration has been given this case by the Court, but we believe that the opinion of the Court shows in the respects pointed out above that the Court has overlooked material matters of law and fact and that the case should be reconsidered. We ask respectfully that Petitioner's petition for a rehearing be granted and that upon reconsideration the Decree of the Court below be reversed and the Court below directed to enter an order denying enforcement of the Board's Order.

Respectfully submitted,

MILTON R. TUCKER,
ROBERT T. BURCH,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

No. 39.—October Term, 1945.

May Department Stores Company, doing business as Famous-Barr Company, Petitioner, *vs.* National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 10, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

This writ of certiorari brings here for review the decree of the Circuit Court of Appeals enforcing an order of the National Labor Relations Board which was entered after the Board found upon hearings that petitioner had violated Sections 8(1) and 8(5) of the National Labor Relations Act.[1] The petition for the writ presented issues (1) as to whether two small related departments with thirty to forty employees may be an appropriate bargaining unit when the department store of which they are a part has around three hundred and fifty departments and approximately five thousand employees; (2) as to whether the Board could properly place the name of a Joint Labor Council on the ballot for the employees' bargaining representative when none of the employees were members of the Council but only of a local union which was associated with others in the Council; (3) as to whether seeking authority by the employer from the National War Labor Board to increase wages without taking up the increase with a certified bargaining agent may be an unfair labor practice under Sec-

[1] 49 Stat. 452-53. "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

. . . . . .

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Opinion of the C. C. A., National Labor Relations Board *v.* May Dept. Stores Co., 146 F. 2d 66; determination of National Labor Relations Board, 53 N. L. R. B. 1366.

tion 8(1) of the Labor Act; and (4) as to the propriety of a Board order to cease and desist generally from unfair labor practices instead of an order to cease and desist only from the type or types of unfair practices which the Board found the employer committed. As these issues presented important problems in the administration of the National Labor Relations Act, certiorari was granted. 324 U. S. 838.

Appropriate Unit. After a hearing in which the employer, the petitioner here, the May Department Stores Company, doing business as Famous-Barr Company, a St. Louis department store, took part, the Labor Relations Board, on June 16, 1943, found that all non-supervisory employees of the Company, then 28 in number, working in the main and basement men's bushéling rooms constituted an appropriate unit for collective bargaining within the meaning of Section 9(b)[2] of the Labor Relations Act. An election was ordered. It resulted in the choice and designation of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, C.I.O., as the representative for collective bargaining of the employees of the unit.

The Company contended that a store-wide unit of its five thousand employees was the most appropriate and at any rate that employees in the women's alteration and the fur alteration departments should be added to the employees in the men's bushéling rooms to form the unit. As there is no provision for direct review of the determination and certification of the bargaining representative, the Company, in order to secure judicial review of the finding as to the unit, awaited this proceeding which sought a decree directing it to bargain collectively with the representative. See *Inland Empire Dist. Council, etc.* v. *Millis*, 325 U. S. —.

A few months before this proceeding a determination that all employees of the Company subject to stated exceptions were the appropriate unit for collective bargaining had been sought by the C.I.O. The Company objected because no sufficient showing of representation was made and because it took exception to the exclusion of certain employees from the proposed unit. This petition was dismissed for failure of the C.I.O. to make a substantial showing

2 49 Stat. 453, Sec. 9. "(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

of membership in the suggested store-wide unit. 46 N. L. R. B. 305. That prior application is not a bar to this. The Board was careful to note in this proceeding that a larger unit might be fixed as appropriate if self-organization developed. Other departments of the store had members of this and other unions as employees. This presence of union members throughout the enterprise was a matter of consideration in deciding upon the appropriate unit but was not decisive. Compare *Pittsburgh Plate Glass Co.* v. *Board*, 313 U. S. 146, 156. No labor organization claimed to represent the entire body of employees. Therefore the Board determined to approve this unit as appropriate so that collective bargaining might start for these employees without waiting until more employees might be organized into a larger unit. Compare *Board* v. *Hearst Publications*, 322 U. S. 111, 134.

Under Section 9(b) the Board is delegated the authority to determine the unit. The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion but to "guarantee against arbitrary action by the Board."[3] The Board had before it the business of the company, the numbers of employees, the treatment of all employees as a unit by management with reference to sick leave, hospitalization, employee privileges, vacations, et cetera. Evidence was presented that a large proportion of employees in the proposed unit were members of the same union. It had testimony as to similarity and dissimilarity in tailoring and altering between the men's and women's alteration rooms. There was evidence that those who work on men's clothing, speaking generally, belong to a different union organization than those who work on women's clothes. The Board considered the interchange of workers between the two groups. We think that there was ample testimony to support the Board's conclusion that the employees of the two busheling rooms were an appropriate unit, since these employees had a degree of self-organization and a special trade which sufficiently differentiated them from other employees.

Form of Ballot. Petitioner objects to the certification because the ballot contained the name of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees, as a candidate for bargaining representative from the unit. This was

[3] S. Rep. No. 573, 74th Cong., 1st Sess., p. 14.

the organization which was certified. It had filed the petition for determination of the representative. The Council claimed that more than 51% of the employees in the suggested unit had designated it as their collective bargaining representative. The Board directs what names go on the ballot. Unless there is a showing of a substantial number of employees in the proposed unit who have become members of and selected the petitioner as their bargaining representative, the Board does not ordinarily order an election.[4] This is an administrative policy of the Board. In this case on the Joint Council's petition for certification, the Board found that the Council had a majority of the employees. As a matter of fact it was a local union which the employees had selected and joined. The Board pointed out in its finding of facts on the petition for an election that the Joint Council represented this local and similar locals in other stores.

The Company says that some employees may have been misled by the ballot into thinking that the Joint Council had a substantial number of the unit's employees as members because elections are not ordinarily called unless that situation exists. The local was represented by the Joint Council. Cf. *National Labor Relations Board* v. *Franks Bros. Co.*, 137 F. 2d 989, 992, affirmed on other grounds *Franks Bros. Co.* v. *Labor Board*, 321 U. S. 702. The Joint Council was chosen by a majority of the employees of the unit and certified. In the circumstances of this election, we see no basis for the Company's objection to the certified representative on the ground of possible confusion of the employees.

Action on Wages. The Board found that the Company interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, under the circumstances herein detailed, in seeking the necessary approval (56 Stat. 765; Executive Order 9250, 7 Fed. Reg. 7871) on August 30, 1943, of the National War Labor Board for an upward wage adjustment for a large proportion of its employees, including the employees of the unit here involved, without bargaining collectively on the subject of the wages with the certified union. A letter accompanied the request to the War Labor Board which explained that

4 In the Matter of Houston Shipbuilding Corporation, 41 N. L. R. B. 638; In the Matter of American Manufacturing Company, 41 N. L. R. B. 995.

certain craft employees, not here involved, were excluded from the application for authority to increase wages because they were covered by collective bargaining agreements. The letter went on to say:

> "The St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, C.I.O., . . . has been certified by the National Labor Relations Board, but we do not regard this as an appropriate unit and have consistently taken that position and have so notified all parties concerned. It is our intention to submit that question to the Courts, if and when the occasion arises. We have not recognized this Union and have not bargained with it for the employees in Departments 280 or 281 and no negotiations with that Union are pending. It is intended, however, that the employees in Departments 280 and 281 shall be included in this application.
>
> "We do not believe that any of the organizations named in the application, nor the organization named above, have any interest whatever in the enclosed application. However, if the organization named above should object to the inclusion of the employees of Departments 280 and 281 in the application, you are advised that said application may be considered as having been amended so as to exclude those employees from the application."

The next morning the employees were told over the store address system of the application for a wage increase for all employees, except higher paid executives and those employees "whose salaries have been fixed by closed shop agreements." A short time later another reference to the application was made over the address system. A similar announcement appeared in the September 3 issue of the store paper. The conditional offer to exclude the employees of the unit was not referred to in the announcements. Upon these facts the Board found a violation of Section 8(1).

The Company urges that its request for authority, without negotiation with the certified union as to the application to the War Labor Board, was not an unfair practice under Section 8(1) but only a necessary result of its position on non-recognition of the certified representative because the Company did not agree with the Board's determination of the appropriate unit for the selection of representatives. The Company says it could not give recognition to the certified agent and maintain this position.

We have in a preceding division of this opinion stated our conclusion that the Joint Council was a properly certified bargaining representative. Therefore at the time of the request to the War

Labor Board for authority to increase wages, the Joint Council must be considered as a properly certified bargaining agent. Company action in regard to it must be judged in that light even though its attitude toward the certification made its choice difficult.

The Joint Council was certified on July 12, 1943. After the election, the Council had requested a conference with the Company for negotiating a contract to cover wages, hours and working conditions. This request was declined on July 19th with the statement that the Company did not agree with the decision of the Board and desired to preserve its full rights to question the result as it "may see fit." The application to the War Labor Board followed on August 30th.

It is settled law that the Labor Relations Act makes it an employer's duty to bargain collectively only with the duly recognized or accredited representative of the employees. Disregard of this duty violates Section 8(1) of the Act. Section 9(a). *Medo Corp.* v. *Labor Board*, 321 U. S. 678, 683-84. Any other conclusion would infringe an essential principle of collective bargaining. See *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 338. Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think logically or realistically, be distinguished from bargaining with individuals or minorities. The fact that the application to the War Labor Board was not the actual increase of wages but a necessary preliminary does not make unilateral action, accompanied by publication of the step taken to the employees, any the less objectionable. The application to the War Labor Board marked a unilateral determination by the Company that the employees of this unit should have the specific increase deemed due them by the Company or none at all, if the bargaining agent should object in accordance with the letter quoted above. The employer was not getting into position to negotiate with the agent. He declared the contrary and proposed that he, as employer, would make the increase if permission were granted.

Two national labor groups had each separately sought for months to organize the Company. One effort to secure the designation of a unit had failed. The present designation was made over the protests of the Company. It had urged in its motion for reconsideration of the order of election:

> "There are two competing labor organizations seeking to organize the employees in this store. By this decision one of them is granted an election in the unit composed of two departments. There are some 350 departments in this store and if this Employer is to be confronted with elections and separate bargaining for each one or two departments it will be an endless and intolerable interference with store operations, which should not be permitted."

By going ahead with wage adjustments without negotiation with the bargaining agent, it took a step which justified the conclusion of the Board as to the violation of Section 8(1). Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent. If successful in securing approval for the proposed increase of wages, it might well, as the Board points out, block the bargaining representative in securing further wage adjustments.

It may be that the Company sought only to preserve its opportunity to contest the certification of the unit. It is pointed out that the increases for which approval was sought covered several thousand employees and that it is hardly conceivable that a general increase for so many would be sought to injure so few. But the Board's contention is not that the application, as a whole, was for the purpose of undermining the Council. Its conclusion was that the manner of presenting and publicizing the application had the effect of coercing the employees. Instead of taking up the increase of this unit's wages with the Council, filing a joint application, with reservation of the Company's legal right to challenge the certification of the bargaining agent when any complaint might be filed for refusal to barg[illegible] collectively, or, omitting the employees of the questioned unit, if the Council would not join in such an application, the Company chose to ignore the properly certified agent. Nor can we agree that if, under the procedure suggested, the employees in this unit had been omitted from the employees who received increases, there would have been danger that the National Labor Relations Board would have considered such omission an unfair labor practice. Whatever weight an omission might have, under other circumstances, under these it would have followed an effort to avoid injury to the employees and could not properly be held an interference with their rights.

We find no basis for eliminating the announcements or the publication from consideration on the ground that they were an exercise of the right of free expression, secured by the First Amendment. They are a part of the totality of Company activities and were properly received by the Board as evidence of the unilateral action of the Board. *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 477.

Breadth of Order. Petitioner complains here of the refusal of the Court to modify paragraph 1(b) of the Board's order to the extent which petitioner explicitly asked for below in its petition for rehearing.[5] That paragraph, together with another which enjoins refusal to bargain, is set out below.[6] Petitioner argues

[5] Section 10(e) of the National Labor Relations Act, 49 Stat. 454, precludes the consideration by the Circuit Court of any objection not raised before the Board, unless such failure is excusable because of "extraordinary circumstances." This Court therefore is authorized, *sua sponte*, to appraise the record to determine the power of the Circuit Court to review paragraph 1(b) of the Board's order. Board v. Bradford Dyeing Assn., 310 U. S. 318, 341.

In this proceeding the paragraph first appeared in the intermediate report of the Board's examiner. The petitioner excepted specifically to paragraph 1(b) of the proposed order as "not supported or justified by the record." This was the only objection made to the paragraph in question in the record of the proceedings before the Board. The examiner's recommendation was adopted by the Board in its order. Unless this objection was sufficiently specific to apprise the Board of the question now presented, the Circuit Court had no power to consider it. Marshall Field & Co. v. Board, 318 U. S. 253. In the Marshall Field case we declined to consider an issue as to the power of the Board to grant a back pay order which was construed as barring the deduction of unemployment compensation from the award, although the question was raised by answer and decided by the Circuit Court of Appeals, National Labor Relations Board v. Marshall Field & Co., 129 F. 2d 169. Our reason for refusing review was that the only objection to the Board's power was error by the examiner "in making each and every recommendation." The remedy recommended by the examiner was the usual back pay less earnings without any word in the report as to the unemployment compensation. This was too general to apprise the Board of an intention to bring up the question of the deductibility of the compensation and of the necessity for findings.

Although it falls short of desirable specificity, we think the objection was sufficient in the present case. No further findings are needed. The paragraph in issue is a standard form of order frequently used by the Board; the same question with respect to an almost identical order was considered by this Court in Labor Board v. Express Pub. Co., 312 U. S. 426, and has been a frequent subject of dispute in the Circuit Courts (see n. 10 *infra*). These circumstances coupled with an objection that the order was "not supported or justified by the record" put the Board on notice of the issue now presented.

[6] Decreed that May Department Stores Company, etc., shall: "1. Cease and desist from: (a) Refusing to bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the bushelling room,

that the broad, blanket provisions of 1(b) are invalid, even though, of course, restricted to the few employees in the affected unit. The language of the prohibition covers interferences with all the rights of these employees which are secured by section 7 of the Labor Act, while at the most, petitioner urges, the Board has found and the Circuit Court sustained only two unfair labor practices by petitioner, "(1) refusal to bargain and (2) the storewide salary increase." Both of these, it is asserted, are but incidents in petitioner's effort to obtain judicial review of the Board's certification. As the Board's selection of an appropriate unit to choose the employees' bargaining representative and the Board's subsequent certification of the representative chosen, section 9, is not judicially reviewable directly, petitioner takes the position that it committed the unfair labor practice of refusing to bargain with an accredited union, merely to open the way for judicial review of the certification.[7] Consequently petitioner urges the cease and desist order should be no broader than the refusal to bargain which is covered by paragraph 1(a), note 6 *supra*, with the addition of "or from any other acts in any manner interfering with the representative's efforts to negotiate." The suggested addition is taken from the *Express Publishing Company* case, 312 U. S. at 438. Thus the breadth of paragraph 1(b) of the Board's order is sharply challenged as being beyond the power of the Board in view of the evidence and findings in this case.

The scope of injunctions which follow National Labor Relations Board determinations is important to employer and employee. While contempt proceedings can be instituted only by the Board and in the public interest,[8] the possibility of contempt penalties

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second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent;

"(b) In any other manner interfering with, restraining, or coercing its employees who are referred to in paragraph 1(a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act."

[7] See American Federation of Labor v. National Labor Relations Board, 308 U. S. 401; Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U. S. 146; Inland Empire Dist. Council etc. v. Millis, 325 U. S. — [65 S. Ct. 1316].

[8] Amalgamated Workers v. Edison Co., 309 U. S. 261, 269.

by the court for future Labor Act violations adds sufficient additional sanctions to make material the difference between enjoined and non-enjoined employer activities.[9] The decision in the *Express Publishing Company* case emphasized this issue.[10] The paragraph under attack in that case was substantially like the paragraph here attacked.

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[9] See for business operations under contempt orders 47 Columbia L. Rev. at 913.

[10] The problem of the scope of injunction dealt with in National Labor Relations Board *v.* Express Publishing Co., 312 U. S. 426, has recently received careful consideration by judges and writers. 41 Columbia L. Rev. 911; 29 Georgetown L. J. 1026; [illegible] Harvard L. Rev. 472; 23 Boston University L. Rev. 447; 54 Yale L. J. 1[illegible]

Illustrative of the decisions in the Circuit Courts are the following cases:

1. National Labor Relations Board

(a) *Upholding a general § 8(1) order on the basis of a single unfair labor practice (the nature of the unfair practices is given in brackets):*

Labor Board *v.* Highland Park Mfg. Co., 110 F. 2d 632 (C. C. A. 4) [§ 8(5)]; Art Metals Const. Co. *v.* Board, 110 F. 2d 148 (C. C. A. 2) [§ 8(5)]; Wilson & Co. *v.* Board, 124 F. 2d 845 (C. C. A. 7) [§ 8(3)]; Labor Board *v.* Sunbeam Electric Mfg. Co., 133 F. 2d 856 (C. C. A. 7) [§ 8(1)] Labor Board *v.* Standard Oil Co., 138 F. 2d 885 (C. C. A. 2) [§ 8(2)].

(b) *Upholding a general § 8(1) order where there was more than one unfair practice:*

Labor Board *v.* Boss Mfg. Co., 107 F. 2d 574 (C. C. A. 7) [§§ 8(1), 8(3), 8(5)]; Labor Board *v.* Reed & Prince Mfg. Co., 118 F. 2d 874 (C. C. A. 1) [§§ 8(1), 8(3), 8(5)]; F. W. Woolworth Co. *v.* Board, 121 F. 2d 658 (C. C. A. 2) [§§ 8(1), 8(3)]; Board *v.* Algoma Net Co., 124 F. 2d 730 (C. C. A. 7) [§§ 8(1), 8(3)]; Labor Board *v.* Baldwin Locomotive Works, 128 F. 2d 39 (C. C. A. 3) [§§ 8(1), 8(2), 8(3), 8(4)]; Labor Board *v.* Brezner Tanning Co., 141 F. 2d 62 (C. C. A. 1) [§§ 8(1), 8(3)]; Idaho Potato Growers *v.* Board, 144 F. 2d 295 (C. C. A. 9) [§§ 8(3), 8(5)].

(c) *Limiting a § 8(1) order based on a single unfair labor practice to acts specifically condemned:*

Globe Cotton Mills *v.* Board, 103 F. 2d 91 (C. C. A. 5) [§ 8(5)] Labor Board *v.* Swift & Co., 108 F. 2d 988 (C. C. A. 7) [§ 8(2)]; McQuay-Norris Mfg. Co. *v.* Board, 119 F. 2d 1009 (C. C. A. 7) [§ 8(5)]; Labor Board *v.* Newark Morning Ledger Co., 120 F. 2d 262 (C. C. A. 3) [§ 8(3)]; Labor Board *v.* Burry Biscuit Corp., 123 F. 2d 540 (C. C. A. 7) [§ 8(2)]; Labor Board *v.* Stone et al., 125 F. 2d 752 (C. C. A. 7) [§ 8(1)]; Commonwealth Edison Co. *v.* Board, 135 F. 2d 891 (C. C. A. 7) [§ 8(2)]; Consolidated Aircraft Corp. *v.* Board, 141 F. 2d 785 (C. C. A. 9) [§ 8(1)]; Labor Board *v.* Walt Disney Productions, 146 F. 2d 44 (C. C. A. 9) [§ 8(3)]; Labor Board *v.* Lipshutz, 149 F. 2d 141 (C. C. A. 5) [§ 8(1)].

(d) *Limiting a § 8(1) order where there was more than one unfair labor practice:*

Press Co., Inc. *v.* Board, 118 F. 2d 937 (App. D. C.) [§§ 8(1), 8(3)]; Labor Board *v.* Grower-Shipper Vegetable Assn., 122 F.

The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it "from engaging in any unfair labor practice affecting commerce." Section 10(a).[11] Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interferences with the rights of those who seek the courts' protection.[12] Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act.[13] We think that the Board has the same power to determine the needed scope

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2d 368 (C. C. A. 9) [§§ 8(1), 8(3)]; Wilson & Co. *v.* Board, 123 F. 2d 411 (C. C. A. 8) §§ 8(1), 8(2), 8(3)]; Labor Board *v.* Servel, Inc., 149 F. 2d 542 (C. C. A. 7) [§§ 8(1), 8(3)].

2. Office of Price Administration.

A similar situation prevails with respect to the use of injunctions to restrain violations of regulations issued under the Emergency Price Control Act, 56 Stat. 23.

(*a*) *Sustaining general injunctions on the basis of particular violations of a regulation:*

Bowles *v.* Montgomery Ward & Co., 143 F. 2d 38 (C. C. A. 7) [preliminary injunction against violation of any price regulation for violation of several provisions of one regulation sustained].

(*b*) *Sustaining limited injunctions:*

Bowles *v.* Town Hall Grill, 145 F. 2d 680 (C. C. A. 1) [violation of restaurant ceiling prices on poultry, lobster, gin items; injunction limited to such items sustained]; Bowles *v.* Sacher, 146 F. 2d 186 (C. C. A. 2) [sustaining preliminary injunction limited to particular type of violation proved].

3. Federal Trade Commission

(*a*) *Enforcing or affirming order broader than specific acts complained of:*

Ostler Candy Co. *v.* F. T. C., 106 F. 2d 962 (C. C. A. 10); Hershey Chocolate Corp. *v.* F. T. C., 121 F. 2d 968 (C. C. A. 3); Eugene Dietzgen Co. *v.* F. T. C., 142 F. 2d 321 (C. C. A. 7).

(*b*) *Limiting orders to specific acts:*

F. T. C. *v.* Beechnut Packing Co., 257 U. S. 441; F. T. C. *v.* A. McLean & Son, 84 F. 2d 910 (C. C. A. 7); Helen Ardelle, Inc. *v.* F. T. C., 101 F. 2d 718 (C. C. A. 9).

11 Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 461; Union Pacific R. Co. *v.* United States, 313 U. S. 450, 470; United States *v.* Bausch & Lomb Co., 321 U. S. 707, 724.

12 Hecht Co. *v.* Bowles, 321 U. S. 321, 328; Wyoming *v.* Colorado, 286 U. S. 494, 508.

13 Sherman Act—Standard Oil Co. *v.* United States, 221 U. S. 1, 77:

"It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift* v. *United States*, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to

of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation.

That power of the Board is subject to review under Section 10. While the Board has been delegated initially the exclusive authority to prevent unfair labor practices,[14] courts, which are called upon to enforce such orders by their own decrees, may examine its scope to see whether on the evidence they go so beyond the authority of the Board as to require modification as a matter of law before enforcement. Section 10(a) and (e). The *Express Publishing Company* case declared:

> "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." P. 437.

We think that, in the circumstances of this proceeding, although there is a violation of Section 8(1) as well as 8(5), the violation

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enforce the statute requires the application of broader and more controlling remedies."

"So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act." P. 79.

"We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved." P. 81.

Local 167 *v.* United States, 291 U. S. 293, 299:

"Appellants seek elimination of the provision of the decree that enjoins them from using any of the offices or positions in Local 167 or the shochtim union 'for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof.' The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators. *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532. . . . When regard is had to the evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as unnecessary or without warrant."

See Amer. Foundries *v.* Tri-City Council, 257 U. S. 184, 194.

[14] S. Rep. No. 573, 74th Cong., 1st Sess., p. 15; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23.

8(1) is so intertwined with the refusal to bargain with a unit erted to be certified improperly that without a clear deter- ination by the Board of an attitude of opposition to the purposes the Act to protect the rights of employees generally, the decree d not enjoin Company actions which are not determined by Board to be so motivated.

This conclusion requires a modification of the decree so that injunction will not apply generally to all violations under the of the rights of the employees in Departments 280 and 281, will apply to other interferences, in violation of Section 8(1) otherwise, with the Council's representation of these employees. ere should be added to paragraph 1(a) of the decree, note 6 *ra*, the following clause, "or from any other acts in any manner erfering with the representative's efforts to negotiate for or resent the above named employees as bargaining agent." Para- ph 1(b) should be stricken. Textual corrections should be made onform to these changes. As thus modified, the decree is

Affirmed.

Mr. Justice JACKSON took no part in the consideration or de- on of this case.

SUPREME COURT OF THE UNITED STATES.

No. 39.—October Term, 1945.

May Department Stores Company, Doing Business as Famous-Barr Company, Petitioner, *vs.* National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 10, 1945.]

Mr. Justice Rutledge, concurring in part.

I cannot agree, as the Court seems to say and the Labor Board found,[1] that there were two unfair practices in this case, (1) refusal to bargain, contrary to § 8(5); and (2) interference, restraint and coercion of employees in violation of § 8(1). I think only one unfair labor practice was shown; namely, refusal to bargain; and for that reason I think the Board's order must be modified to eliminate the restraints based on its finding of violation of § 8(1) as the *Express Publishing Company* case, 312 U. S. 426, requires in such a situation.

I am unable to understand the majority's application of that case to a situation in which the Board has found there were two different and substantial violations of the Act. The Court does not hold to the contrary or rule that either finding was unsupported by the evidence. Rather it seems to approve and sustain both. Yet it modifies, as I think ambiguously,[2] the relief which

[1] The Board adopted the trial examiner's intermediate report without change, the employer not having applied for oral argument. 53 N. L. R. B. 1366. After reviewing the evidence under the separate headings of "A. The refusal to bargain" and "B. Interference, restraint and coercion," the report found as to the former that "on July 19, 1943, and at all times thereafter" the company had refused to bargain collectively with the union; as to the latter "that, by its unilateral action in seeking approval of its proposed wage adjustments," and by later publicizing this action, it had "interfered with, restrained and coerced its employees" in the exercise of the rights guaranteed in §7. There were separate and independent conclusions of law based on these findings, to which the separate provisions of the order related.

[2] The modification directed by the Court, if it is more than a change in the form of words used in Paragraph 1(b) of the Board's order, necessarily cuts down the substance of the order. But since the injunction will apply "to other interferences, in violation of Section 8(1), or otherwise, with the Council's representation" of employees in Departments 280 and 281, and

the Board found appropriate to prevent a repetition of the interference, coercion and restraint it determined had been inflicted upon the employees, in addition to the refusal to bargain. The *Express Publishing* case covers no such situation. It was limited to one where the Board had imposed both types of restraint upon a finding only of refusal to bargain.[3]

It is apposite to inquire therefore whether that case has now been expanded to forbid the Board to impose both types of restraint where it has found both kinds of violation and neither finding is overturned. If so, I think the result squarely conflicts with repeated decisions, reflected in the language of the opinion in the *Express Publishing* case itself, that "having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts." 312 U. S. 426, 436.[4]

It is important for the administration of the Act to know whether the Board is to be free to adapt the remedy to fit the evil it has found to exist, as the statute commands, § 10(c); or, on the contrary, its remedy thus adapted may be stricken down or modified although the finding which justifies it is approved. That in my judgment goes beyond correction of abuse of the Board's

since violation of § 8(1) includes interference, restraint or coercion of employees' rights as guaranteed by § 7, it is difficult to understand in just what particulars the order has been modified. In the absence of more definite specification we must accept the Court's modification as meaning that some substantial change from the order's terms is intended.

[3] Under the ruling the Board is not free to utilize § 8(1) as a device for multiplying an unfair practice under § 8(5), so that the single act of refusing to bargain may be made to justify an order forbidding not only that conduct but also the numerous types of unfair practice prohibited by the broad language of § 8(1). The gist of the decision was that the Board cannot thus pile unfair practice on unfair practice, like presumption on presumption, for purposes of enforceable relief, notwithstanding the act of merely refusing to bargain may be held technically to violate both sections in view of the language of § 7. National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, 433.

[4] This Court has, in various contexts, declared that the particular means by which the effects of unfair labor practices are to be expunged is for the Board and not for the courts to determine. Virginia Electric & Power Co. v. National Labor Relations Board, 319 U. S. 533, 539; National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, 600; International Association of Machinists v. National Labor Relations Board, 311 U. S. 72, 82. See National Labor Relations Board v. Bradford Dyeing Association, 310 U. S. 318, 342-343. And the Court has said that "the relation of remedy to policy is peculiarly a matter for administrative competence" and that "courts must not enter the allowable area of the Board's discretion. . . . ." Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 194. See also Regal Knitwear Co. v. National Labor Relations Board, 324 U. S. 9, 13.

discretion and substitutes the Court's judgment for the Board's in devising the appropriate remedy.

For this reason it becomes important to state the different reasons why I think the order should be modified to eliminate any restraint based upon the finding of violation of §8(1). It is not because this Court has power or discretion, when there are two substantial and different unfair practices, to modify the Board's order by restricting the relief to what is appropriate to prevent repeating only one or by other modification to eliminate relief appropriately designed by the Board to prevent repetition of unfair practices it has found to exist. It is because, in my opinion, there was only one unfair practice and that was the refusal to bargain. Hence I think the *Express Publishing* case exactly applies and does so without necessity for extending the scope of its ruling as the Court's application appears to do.

In my judgment an employer does not commit an unfair labor practice when he does no more than exercise rights secured by the Federal Constitution and laws, including the Wagner Act.[3] That Act does not put him to the choice of giving up his rights or exercising them on pain of being found guilty of unfair practice. Apart from the evidence relating to refusal to bargain under §8(5), there was nothing, in my opinion, which went beyond what was necessary to exercise or preserve the employer's rights secured by law. The application to the War Labor Board; for approval of the proposed weekly increase of $2.00 for all the St. Louis employees, except those represented by recognized unions, was made August 31, 1943, shortly after the company had declined to bargain with the union in order to preserve its right to contest appropriateness of the unit. Announcements of this action over the public address system followed on September 1 and 11, with one also in "Store Chat" on September 3.

In the background of the facts, I do not think these acts amounted to more than the exercise of legal rights secured to the employer by the Wagner Act, the Stabilization Act and the First Amendment. They constituted neither a wage increase nor an offer of one. There was no more than taking steps to secure official approval, required in advance by the Stabilization Act, to

[3] The Wagner Act, designed to promote the public interest by securing employees' rights, does so by appropriate remedies which also afford protections for the employer. See text at note 13.

make an increase, or tender one, at some uncertain future date, possibly never to arrive. The application was merely a necessary preliminary step to later action, which might or might not materialize, in the nature of dealing with employees or offering to do so, whether directly or through their bargaining representatives.

The case therefore is not *Medo*,[6] in spite of the Board's repeated and insistent argument to the contrary. There the employer actually dealt with the employees, not only negotiating but contracting with them. So in *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332. Here there was neither negotiation nor contracting. There was nothing the employer could offer at that time or the employees then could accept. There was only preparatory action looking to the possibility of later negotiations, and announcement of this action to the employees.

If the employer had the right to put itself legally in position to negotiate, either with the employees or with the union, it also had the right to state what it had done. The effect of the Board's decision, and now apparently of the Court's, is to rule that the Wagner Act so circumscribes an employer that he cannot take the necessary preliminary steps, in this case required by law, to place himself in position to undertake bargaining with his employees, whether directly or through their selected representatives. It is further to hold that if he takes such steps, without having first secured the union's permission, he must keep the fact to himself and dare not disclose to his employees what is to all others a matter of public record. This goes beyond protecting the rights of employees. It gives to the union a veto on management, not only as respects negotiations for terms of employment but for putting the employer in position to negotiate. No case here has gone so far and in my judgment the Wagner Act does not contemplate that any should do so.

Other facts bear out this conclusion. One is that the Board made no finding that the employer's action was taken with intent to interfere with, restrain or coerce the employees in respect to their rights. Naturally enough there was no such finding. The application affected some 4500 employees. The unit involved only

[6] Medo Photo Supply Corp. *v.* National Labor Relations Board, 321 U. S. 678.

about 30. It is hardly conceivable that the employer would have taken this step in relation to so many for the purpose of coercing, interfering with or restraining 30. There is lacking therefore any showing or finding of intent, a factor the courts have considered important in concluding from otherwise innocent or equivocal facts that unfair practice may exist;[7] and one which in this case the Court apparently makes crucial to determine whether relief relevant to a finding of unfair practice may be sustained. The Board found only that the employer's "unilateral action," in making the application to the War Labor Board and in announcing this fact "*had the effect* of depriving the Union of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent." (Emphasis added.)

Even were this true, it has not heretofore been held that the Wagner Act forbids an employer to take any preliminary step whatever looking toward dealing with his employees in the future which, though not intended to discredit the union, may have the effect to prevent it from obtaining some credit for proposing possible future action which in fact the employer has proposed. Nothing in the Act requires an employer to maintain a union's prestige or to give it credit for originating all proposals which may have some future effect upon his relations with his employees. Section 8 (1) forbids interference, coercion and restraint upon employees, in the exercise of their rights, not the mere failure of the employer to magnify the union's influence.

Moreover the Board made no finding, presumably because there is no evidence to sustain one, of particular and concrete facts showing that the employer's so-called "unilateral action" adversely affected the union's status among its members or other employees.[8] It only concluded that the action "reasonably [may] be said to have undermined the Union . . . and to have

[7] See Montgomery Ward & Co. *v.* National Labor Relations Board, 107 F. 2d 555, 559; National Labor Relations Board *v.* Whittier Mills Co., 111 F. 2d 474, 478-479; National Labor Relations Board *v.* Elkland Leather Co., 114 F. 2d 221, 224; National Labor Relations Board *v.* Chicago Apparatus Co., 116 F. 2d 753, 756-757; Peter J. Schweitzer, Inc. *v.* National Labor Relations Board, 144 F. 2d 520, 522.

[8] The general "finding" that the company's action in making the application and publicizing it "interfered with, restrained, and coerced its employees," 53 N. L. R. B. at 1371, rested on no more than the Board's assertion that "it logically follows" that these acts "had the effect" of depriving the union of credit, and "may . . . be said to have undermined" it.

discouraged employees generally in their union affiliation." Presumably, since no such effects were proved or found specifically, the basis for this conclusion was the Board's "experience," though this was not referred to in the order or the report on which it was founded. That foundation was not sufficient, in my judgment, in the absence of proof of more unequivocal acts of unfair practice, of any finding of intent to interfere, restrain or coerce, and of any showing whatever of specific discouraging or undermining effects. Something more than supposition should underlie a conclusion which supports a finding of unfair practice.

Nor did the employer ignore the union's possibly legitimate status or its right to have a voice in the matter of the increase, if approval by the War Labor Board should materialize. The application set forth the essential facts with reference to the existing dispute concerning appropriateness of the unit, the employer's intention to litigate the question whenever it might, its nonrecognition of the union pending the obtaining of a decision, and its purpose for these reasons to include the affected employees in the application. But the application went on to say that if the union should object to the increase, for Departments 280 and 281, the Board should consider it as amended to exclude those employees.[9]

This hardly furnishes ground for concluding that the employer was attempting to "short-circuit" the union, undermine it, or discredit it with the employees. It explicitly recognized that the union, if rightly designated and certified, was entitled to say whether or not the proposed change in pay should become effective. Actually, that right was conceded, regardless of the ultimate outcome of the issue on validity of the certification.[10] Clearly, in view of this concession, there was no effort either to contract with the employees directly or to deal with them, over the union's head, about the increase. Whether or not it should become effective as to them was left, not to the employees themselves, but to the sole and exclusive judgment of the union. There was therefore no semblance of the short-circuiting or direct dealing with employees which was present in both the *Medo* and the *J. I. Case* decisions.

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[9] The Board's brief states that the union objected and the War Labor Board accordingly eliminated the bushelmen from the application, citing In re May Dept. Stores Co., N. W. L. B. Case No. 7-6585 (unreported).

[10] See note 11.

Possibly for this reason the Board is driven back to its "undermining" contention. The company, it says, by including these employees, "put the union on the spot," so that it had no real choice. The argument shows concern for the union's "spot," but gives no recognition to the employer's. The Board does not urge that the company should have excluded these employees from the general application, with good reason. Had this been done, obviously the company would have laid itself open to a charge and a finding of unfair practice under § 8(1). The Board is unwilling, apparently, to put the employer in that dilemma. Cf. *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 699. It does not say, though the Court does by way of dictum, that excluding these employees from the application would not have been an unfair practice. The Board says the employer's only way out was to consult the union before making the application.

This can only mean that the employer was compelled to ask the union's permission to include these employees; in short, that the union had the right under the Wagner Act to veto any action taken by the employer to obtain the necessary legal authority to propose any increase for them, whether directly or through the union. I do not think the Wagner Act confers such a power on the union. Nor did the Stabilization Act or the regulations in effect pursuant to its provisions do so.[11] Moreover, the employer asserts that it could not refer the matter to the union without surrendering the very rights it was seeking to preserve. This, it says, would have amounted to recognition and would have foreclosed it later from securing review under the terms of § 10 upon the question whether the unit was appropriate.

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[11] The regulations required that the application be signed "either (a) jointly by the employer and a duly recognized collective bargaining agency . . . , or (b) by the employer alone." 4 War Labor Rep. xxxi, xxxiii-xxxiv, III, 3. It was further required, in either case, that the application state whether or not there was "a duly recognized collective bargaining agency . . which has not joined with the employer in the application." If so, provision was made for the Wage and Hour Division to notify the organization and request it to inform the office of objections, if any, to action on the application. Cf. note 9. If none were made, the application would be acted on. If made, the matter was to be treated as a dispute and referred to the Conciliation Service of the Department of Labor.

It was apparently in compliance with this regulation that the application in this case set forth the representations concerning the nonrecognition of the union, the dispute, etc. The regulations were amended later to include either a recognized or a certified union. 9 War Labor Rep. xxxiii; 8 Fed. Reg. 16678.

Whether or not that is true, there was certainly good reason to believe it so. The right to review is given in terms only as an incident of an unfair practice proceeding. § 10; cf. *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401; *Inland Empire Dist. Council* v. *Mills*, 325 U. S. —. In this state of the law, the company's only certain remedy was to withhold recognition until the matter could be determined. Had it recognized the union, by seeking its permission to include the affected employees, there would have been no factual or legal basis for the only proceedings by which review was assured; and, in order to secure it, the company then would have been forced to commit some other act of unfair practice or to take its chance upon some other doubtful remedy. In either event, it would have been confronted with its prior action of dealing with the union and the possibilities this would present either for applying the broad doctrine of estoppel or for occupying the inconsistent, not to say indefensible, position of having recognized the union and then having deliberately repudiated the recognition.

I do not think the Wagner Act was intended to put the employer in such a dilemma. It has been settled that he takes the risk of his error when he mistakenly judges that the unit is not appropriate or for other reason that the duly selected or certified union is not entitled to recognition.[12] As to that, the employer's choice was hard, made so by the very state of the law. Had the law been that certification was none of the company's business and that the company had *no* right of review, it would have known its rights and its liabilities. That was not and is not the law. The company was told expressly that it had a right of review, but only in an unfair practice proceeding.[13] It was therefore put to the choice, by the statute's terms, of foregoing review or having it by an act of unfair practice. Hence the finding of unfair practice by refusal to bargain

[12] See, e. g., National Labor Relations Board v. Hearst Publications, 322 U. S. 111; Franks Bros. Co. v. National Labor Relations Board, 321 U. S. 702; Medo Photo Supply Corp. v. National Labor Relations Board, 321 U. S. 678; J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332; Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U. S. 146; National Labor Relations Board v. Bradford Dyeing Ass'n, 310 U. S. 318; National Licorice Co. v. National Labor Relations Board, 309 U. S. 350; cf. H. J. Heinz Co. v. National Labor Relations Board, 311 U. S. 514, 523 (employer bargained but refused to sign written contract).

[13] The attenuated character of the right makes all the more essential that it not be whittled away or nullified by rulings which make its exercise more precarious than it is by the very conditions of its existence.

must be sustained. But, in taking this risk, the employer did no more than it was compelled by law to do to save its rights under the Wagner Act and to avoid being found guilty, by virtue of some alternative course of conduct relating to the application, of further unfair practices.

I do not agree therefore that this necessitous action amounted to an additional unfair practice, in the nature of interference, coercion or restraint of employees' rights, whether or not the finding that it was is sufficient to sustain an independent provision for relief.

A word remains to be said concerning the announcements. As has been stated, if the company had the right to make the application as it did, it also had the right to announce that fact to the public and to the employees, so long as in doing this it did not do so with intent or in a manner to violate the Act. I find nothing in the announcements to justify a finding they were made with this purpose or effect, and there is no finding to the contrary.[14] They were, in my judgment, no more than an exercise of the employer's rights of free speech and a free press, secured by the First Amendment. Cf. *National Labor Relations Board* v. *Virginia Elec. & Power Co.*, 314 U. S. 469; *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. 2d 905; *National Labor Relations Board* v. *American Tube Bending Co.*, 134 F. 2d 993; compare *Texas & N. O. Ry.* v. *Brotherhood*, 281 U. S. 548, 568.

It follows from my view of the case that the Board's order should be modified by striking from it Paragraph 1(b) together with the words "and (b)" from Paragraph 2(b), and as so modified enforced. Accordingly, I think the judgment of the Court of Appeals, enforcing the Board's order, should be modified in these respects and, as thus modified, affirmed.

The CHIEF JUSTICE and Mr. Justice FRANKFURTER join in this opinion.

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[14] The mere fact that the announcements omitted specific reference to Departments 280 and 281 does not supply this element. Such a reference, if made, might have been construed, by its singling out of this unit for special treatment and thereby for invidious implication, as furnishing the very evidence of wrongful specific intent and effect which the Board has failed to find.